IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

(1) BALDEV RAJ ALIAS JAGGA & OTHERS VS. UNION OF INDIA

S.B. Criminal Appeal No.759/2002

(2)MOHAMMED AKRAM @NADIM @ NISAR VS STATE OF RAJ.

S.B.CRIMINAL JAIL APPEAL NO.1261/03
Section 374(2) Cr.P.C. against the Judgment dated 3.8.2002 in Sessions Case No.11/95 passed by Sh. Gulam Hussain, RHJS, Special Judge N.D.PS.Cases, Bikaner.

DATE OF JUDGMENT : May 04th, 2007.

P R E S E N T

HON'BLE MR.JUSTICE CHATRA RAM JAT

Mr. B.S.Rathore , counsl for the appellants.
Mr.P.S.Chundawat, Amicus curaie.
Mr.M.A.Bhurat),S.P.P. for Union of India
Mr.D.D.Kalla)

BY THE COURT:

1. These appeals are directed against the judgment and order dated 3.8.2002 passed by the Special Judge N.D.P.S.cases,Bikaner, whereby the learned Judge by the common judgment convicted the appellants as under :-

1	Baldeo Raj & Gurdev Singh	Under Section 8/21,8/29 N.D.P.S.Act and sentenced for each offence 15 years Rigorous imprisonment and fine of Rs.1 lac and in default of payment of fine one year further imprisonment for each offence.
2	Krishan Lal and Mohammed Akram Sheikh	Under Section 8/21, 8/27-A,8/29,N.D.P.S.Act and sentenced for each offence 15 years R.I. and a fine of Rs.1 lac and in default of payment of fine, one year for each offence.

All the substantive sentences were ordered to run concurrently.

The brief facts of these appeals which are necessary to dispose of these appeals, in nut shell, are as follows.

A secret information regarding transportation of contraband material was received by the officers of D.R.I. Headquarters,Delhi that truck Tata Sumo No.DIL 3983 which is coming from Bikaner to Delhi is carrying heroin. This truck is likely to reach between 9th August 95 to 10th August 95.

2. The above said information was recorded in Head office of DRI Delhi and copy of this information was sent superiors on 6.8.95 and a plan was prepared to catch the truck through DRI Jaipur office. A joint execution operation of catching truck having contraband heroin was chalked out.

3. This joint team formulated a Nakabandi at National

High way No.11 near Chungi Naka Jaipur- Bikaner road and two independent witnesses Gaurishankar and Sushil Modi were accompanied with the team.

4. Officers of the team intercepted the truck and stopped the Tata Sumo No.DIL 3983 in which Harjinder Singh, Baldev Raj and Tarsem Singh were sitting and on enquiry they denied for contraband material in the said truck.

5. It was not considered proper to enqire in the matter on the spot but truck was in presence and observation of independent witnesses carried with escort at office of Customs office, Rani Bazar, Bikaner, where on asking Baldev Singh stated that on 9.8.95 sand measuring 121 quintals were loaded and in sand 32 packets of 1 Kg in plastic bags were concealed . On this information, before search was started, an option was given to accused Baldev Raj, Harjinder Singh and Tarsemsingh under Section 50 of the NDPS Act whether they want to give their personal search and search of truck in presence of Gazetted officer or Magistrate then they gave their consent for Assistant Director.

6. On receiving consent of these accused appellants, as the appellants were uneducated, therefore, notices were read

over and explained to them and obtained their thumb impression in lieu of verification of consent.

7. In presence of independent witnesses, Assistant Director, Revenue Jaipur took their personal search. In personal search of appellant Harjinder Singh he found driving licence issued by DTO Amritsar bearing license No.852/DTO/1082 dated 9.9.87 and photo copy of DIL No.3983 registration certificate which shows registration of truck in the name of Swroop Singh s/o Banarsidass R/o 11365 Idgah Road, Delhi and indian currency notes of Rs.3750/- were recovered. On personal search of Baldev Singh, his driving licence No.B-39538 (Renewal No.C-40334 dt 24.10.92 which was issued by licencing Authority Kangara and Rs.10,000/- were recovered and nothing recovered in search of Tarsem Singh. Thereafter truck was searched and under the clay two bags recovered which was marked as X and Y. On search of cabin of driver there was papers of bal clay which were marked as S.No.1 to 11 and taken in possession and packets from X bag was marked as X1 to X-32 and packet from bag Y were marked as Y1 to Y-32, which were containing brown powder and on testing on drug detection kit it was found that brown material is heroin. Thereafter each packet was measured. X-1 to X-32 packets weighed 32.900 Kg and heroin was 31.640 Kg and Y-1 to Y-32 33.290 kg and heroin was 32 Kg. Total weight of both the

packets were 66.190 Kg and heroin was 63.640 kg.

8. It was considered violation of Section 8 of the Act so under Section 60 of the Act, all material has been taken in custody. From each packets of heroin 5-5 grams,two samples were taken and packed in polythene pouch and put seals and thereafter same were kept in Khaki envelop and signatures of independent witnesses were obtained, and thumb impression of appellants were also taken and N.K.Trivedi Gazetted officer marked his signatures. All the materials were kept under seals according to law.

9. After necessary memos were drawn, statements of witnesses were recorded, accused appellants except Mohd.Khalid were arrested and on completion of the investigation,Shri T.C.Gupta presented the complaint on 3.11.95 against the accused persons.

10. Charges were framed on 11.6.96 by the learned Special Judge, N.D.P.S.Cases, Bikaner, under Sections 21, 23, 27-A and 29 of the N.D.P.S.Act and read over to the Accused appellants, they denied the same and said they have been falsely implicated in this case and claimed for trial.

11. Prosecution in support of its case examined 20

witnesses and exhibited ExP-1 to Ex.P.148.

12. From the evidence of prosecution witnesses and documents exhibited in the record, explanation under section 313 Cr.P.C. was recorded by the learned Special Judge NDPS Cases Court in which accused appellants denied the allegations levelled against them and said that they have been falsely implicated in this case.

13. Accused Baldeo Raj @ Jagga under Section 313 Cr.P.C said that he came to Sri Gangangar for purchase of land from Jangir Singh and was arrested in Sri Gangagnar. No statement was recorded before any Custom officer and he is uneducated person and his thumb impression was taken forcibly.

14. Accused Harjinder Singh under Section 313 Cr.P.C. said that he came to Raisinghnagar to release his friend Kishan Singh and he was falsely implicated in this false case and he is uneducated person and authorities have taken thumb impression on papers but he did not know about this.

15. Accused Krishan Lal under Section 313 Cr.P.C.said that he never went to Bikaner and search was not done in his presence. Nothing was recovered from his house. No statement

was given by him and by beating and threatenings of custom officer and on their dictation, statement was written by him. He further stated his wife and children were called there and if he will not write statement then his children and wife will be beaten by them. After reaching jail, he has sent application to the Judge and medical examination was done in Jail.

16. Accused appellant Gurdev Singh under Section 313 Cr.P.C. statement said that he is innocent and he has no connection with transport company.

17. Accused appellant Mohd. Akaram under Section 313 Cr.P.C. statement said that he is innocent and has been falsely implicated in this case.

18. In explanation under Section 313 Cr.P.C. all the appellants claimed innocence and in defence D.W. 1 to 5 and Ex.D1 to Ex.D-8 documents were produced and learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated hereinabove. Hence, these appeals by the appellants.

19. I have heard the contentions raised before me and with the assistance of learned counsel and perused the record.

20. Learned counsel for the appellants submits that learned trial Court convicted and sentenced appellant Baldev Raj and Gurudev Singh under Section 8/21, and 8/29 N.D.P.S.Act and appellant Krishan Lal and Mohd. Akram Sheikhhave been convicted and sentenced under Section 8/21, 8/27-A and 8/29 of the N.D.P.S.Act and the some grounds have been taken in the memo of appeal against the judgment court below but he is not pressing those grounds and not challenging conviction of the appellants. So conviction may be maintained and upheld.

21. Accused NO.6 Mohammed Khalid was absconder, therefore, he was not presented with charge sheet,therefore, warrant was issued by the Court but it revealed that he has gone to Pakistan,therefore, Court has declared him absconder and ordered to initiate proceedings under Section 82,82 Cr.P.C.

22. During trial accused appellant Harjinder Singh is absconded,therefore, standing warrant of arrest has been issued by the trial Court against him.

23. Learned counsel for the appellants only contention is for the reduction of the sentence looking to the special facts

and circumstances of the case.

24. Learned counsel for the appellants further submits that all the appellants namely [1] Baldev Ram @ Jagga, [2] Krishna Lal,[3] Gurdev Singh and [4] Mohd. Akram are in custody for a long time and they were convicted for the offences for the first time though the sentence imposed on them is imprisonment for a period of 15 years and fine. Learned counsel again states that Hon'ble Apex Court in the matter of Balwinder Singh Vs. Assistant Commissioner Customs and Central Excise reported in 2005 SCC [Cri] 1092 has reduced the sentence wherein the accused respondent Tarlochan Singh was convicted for the offences punishable under Sections 18, 21, 22, 23, 25, 29 and 30 of the N.D.P.S. Act. The recovery of 175 kgs heroine and 39 kgs of opium foreign origin was made from the chamber of the truck in his possession. Hon'ble Apex Court reduced the sentence from 14 years to 10 years for each of the offences under the NDPS Act and also made order that the substantive sentences shall run concurrently. Though the direction to pay the fine was maintained.

16. Learned counsel for the appellants also urged that as per the statements of appellants recorded under Section 313 Cr.P.C. dated 27.10.1998 the age of [1] Baldev @ Jagga, [2] Krishna Lal, [3] Gurdev Singh and [4] Mohd. Akram was 53, 60, 40

and 27 and now this age comes more than 61, 68, 48 and 35 years respectively and thus it is clear that appellants Baldev @ Jagga and Kishna Lal are of very old age whereas the appellants Gurdev Singh and Mohd. Akram belongs to middle age group.

17. Learned counsel further urged that as per Hon'ble Apex Court decision in the matter of Balwinder Singh [Supra] reduction of the sentence should be allowed as accused appellants were not previous convicts or habitual dealers of Narcotic Drug substances and thus appellants are the first time convicted and having spent the long period of custody for more than 11 years and 8 months, therefore, the sentences should be reduced to the minimum prescribed or to reduce the sentence to some extent as this Court considers it just and proper looking to the facts and circumstances of the case.

18. Learned counsel for the appellants further urged that in matter of Balwinder [Supra] the quantity of recovery of heroin was 175 kg and opium of foreign origin was 39 kg whereas in the present case the recovery of heroin only is 63.640 kg and the Hon'ble Apex Court reduced the sentence of the Trilochan Singh's from 14 years to 10 years, so the benefit of reduction in sentence to present accused appellants be given in this case.

19. Learned counsel for the appellants states that Union of India vs Kuldeep Singh (Criminal Appeal No.1468 of 2003 (arising out of SLP (Cri)No2827/2003)}decided on 8.12.2003 relied on by the learned Special Public Prosecutor cannot be applied in this case because in that case the quantity of heroin extracted was very much that is 300kg and that was not a case of minimum sentence but looking to quantum of contraband article Hon'ble Apex Court restored the original sentence awarded by the learned trial Court that is 10 years rigorous imprisonment and fine of Rs.1 lac but in present case the minimum sentence is provided and learned trial Court awarded more than that so the case is distinguishable.

20. Learned counsel also stated that in Balwinder Singh's case (supra) and Union of India vs Kuldeep Singh (supra), the Hon'ble Apex Court awarded 10 years imprisonment .

19. Learned Special Public Prosecutors Shri M.Anees Bhurat, and Mr.D.D.Kalla for the Union of India submitted that as part of arguments the written submissions have been made and learned trial Court i.e learned Special Judge, NDPS Act Cases Court, Bikaner, after considering the record of the case, rightly convicted appellants Baldeo Raj @ Jagga and Gurdev Singh under Section 8/21 and 8/29 of the NDPS Act and Krishan Lal and Mohd. Akram Shikh under Section 8/21,8/27-A and 8/29 of NDPS

Act, though, all the four appellants have been acquitted under Section 8/23 NDPS Act. Accused Harjinder Singh and Mohd. Khalid are absconding. Learned Special Public Prosecutors contended that prosecution story has not been questioned by the appellants and there is no lacunae found in the prosecution evidence on which it may be said that the appellants are innocent and therefore appeal of the appellants cannot be accepted and deserves to be dismissed.

20. Learned Special Public Prosecutor also contended that Balwinder Singh case (supra) is not applicable for the reduction of sentence as in the present case co-appellant Moh. Akran Sheith is a Pakisthani national and looking to the evidence of the prosecution this cannot be a case for reduction of the sentence. Learned Special Public Prosecutor also urged that though the appellants have not been convicted under Section 8/23 of the N.D.P.S.Act but as per the prosecution evidence Mohd. Khalid though is an absconder is also involved and because of that fact also this cannot be a case for the undergone punishment or reduction of sentences so this plea of appellants counsel should be turned down and the conviction and sentence awarded by the learned trial court should be confirmed.

21. Learned Special Public Prosecutor also relied on the decision of Apex Court in Union of India vs Kuldeep Singh (Cr.

AppealNo.1468 of 2003 (arising out of SLP (Cri) No.2827/2003)} decided and urged that as per facts 880 litres of Acitic N Hydride was recovered out of which 330 Kg heroine would have been extracted and learned trial Court punished the accused for 10 years imprisonment and fined up to Rs. 1 lac which was reduced to period of custody undergone for 6 ½ years and fine also reduced to Rs.25,000/- but Hon'ble Apex Court restored the sentence awarded by trial Court and thus looking to factual position, this cannot be case for reduction of any sentence.

22. After going through the submissions of both the parties, admittedly, the counsel for the appellants not challenged the conviction but even if after analysing evidence of prosecution it is clear that P.W.1 Gauri Shankar and P.W.6 Sushil Kumar – who are independent witnesses, have been declared hostile and not supported the case of the prosecution. The evidence of other witnesses prosecution viz. P.W.17 T.C. Gupta, P.W.16 N.K.Trivedi, P.W.15 R.K.Jain, P.W.14 V.K.Gupta, P.W.11 Mool Chand Verma, P.W.10 Sushil Kumar, P.W.9 S.Parmeshwaram, P.W.8 M.K.Serwani, P.W.12 Kishan Singh, P.W.19 O.P.Dadhich, P.W.20 Bhanwar Singh Morya and P.W.5 Roshan Lal were examined from the point of view of trusthworthyness, I find their presence is natural. Even if it is assumed that they are interested for the success of the cases being departmental witnesses, their

evidence is not liable to discarded on that score because it otherwise inspires confidence. Admittedly in the case of interested witnesses the rule of scrutiny is merely a rule of caution rather than the rule of law. Testimony of eye-witnesses, who are natural witnesses of the incident and when one would expected to seen the incident cannot be doubted only because they happened to be departmental witnesses. I find them reliable and trusthworthy and I am of the considered opinion that charges under Sections 21, 29, 27-A NDPS Act is established against the appellants beyond reasonable doubt. I do not see any infirmity in the impugned judgment of the learned trial Court.

23. As to the punishment provided for under Sections 21, 27 A and 29 of the NDPS Act is as under:-

> **Section 21:-Punishment for contravention in relation to manufactured drugs and preparations.-**
>
> Whoever, in contravention of any provision of this Act or any rule or order, made or condition of licence granted thereunder, manufacturers, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable-
>
> [a] .....
>
> [b] .....

[c] where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Section 27A Punishment for financing illicit traffic and harbouring offenders-

Whoever indulges in financing, directly or indirectly, any of the activities specified in sub-clause (i) to (v) of clause (viiia) of Section 2 or harbours any person engaged in any of the aforementioned activities, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Section 29 : Punishment for abatement and criminal conspiracy.-

[1] Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or not be committed in consequence of such abatement or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with punishment provided for the offence.

[2] .....

24. It is clear that as per above provisions of Section minimum

punishment for 10 years rigorous imprisonment and fine of Rs.1,00,000/- is provided with the maximum imprisonment and fine as to the extent indicated above and thus gives a discretion to the Court between the areas of minimum and maximum punishment as per the facts and circumstances of each particular case.

25. For providing punishment there cannot be any foolproof formula it depend on many factors like the nature of the crime, the manner in which it was planned and committed, motive of crime and other attending circumstances are the relevant facts for providing punishment.

26. For providing punishment in respect of offences relating to Narcotic Drugs and Psychotropic Substances the consideration of its effect not only on the health fabric but also on the social order and public interest and national economy. Thus, the object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing – appropriate sentence. This is really a delicate balancing process.

27. After giving the due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and the mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It

has been very aptly indicated in Dennis Councle MCG Dautha V. State of California : 402 US 183: 28 L.D. 2D 711 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

28. Punishing the policy rests on the facts and circumstances of the case, and the court should exercise its discretion judiciously and judicially. When anything is left to any person, Judge or magistrate to be done according to his discretion, the law intends it must be done with sound discretion and according to law. Discretion is to discern between right and wrong; and, therefore, whoever hath power to act at discretion, is bound by the rule of reason and law.

29. As discussed above, the conviction has been upheld of the appellants but as to the leniency or reduction in sentence is concerned, in case of Balwinder Singh (Supra) the contraband recovered was 175 Kg heroine and 39 Kg of opium of foreign region and in Union of India vs Kuldeep Singh (Supra), 880 litres of Acetic N hydride equivalent to 300 Kg heroine. In both the cases Hon'ble Apex Court awarded sentence for 10 years . So far as this case is concerned minimum sentence is 10 years rigorous imprisonment and a fine of Rs 1lac for each offence whereas learned trial Court awarded

15 years rigorous imprisonment and fine of Rs. 1 lac including the default sentence and appellants are going sentence for approximately 12 years (11 years and 8 months) and they are not previous convicts and have been acquitted for offence under 8/23 NDPS Act. So looking to the facts and circumstances of the case,the reduction in sentence is just and proper.

30. In the ultimate result, I find no reason to interfere with the conviction and sentence entered against the appellants and their criminal appeals stand dismissed. The sentence imposed on appellants are imprisonment for 15 years and having regard to the facts and circumstances of the case, I reduced the sentence from 15 years to 12 ½ years (Twelve and half years) each for offences under NDPS Act. The substantive sentences shall run concurrently and direction to pay find is maintained. Default sentences shall also run concurrently.

[CHATRA RAM JAT],J.

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Judgment dictated in open court. Operative part of the judgment reads as under :-

"As discussed above, the conviction has been upheld of the appellants but as to the leniency or reduction in sentence is concerned, in case of Balwinder Singh (Supra) the contraband recovered was 175 Kg heroine and 39 Kg of opium of foreign region and in Union of India vs Kuldeep Singh (Supra), 880 litres of Acetic N hydride equivalent to 300 Kg heroine. In both the cases Hon'ble Apex Court awarded sentence for 10 years . So far as this case is concerned minimum sentence is 10 years rigorous imprisonment and a fine of Rs 1lac for each offence whereas learned trial Court awarded 15 years rigorous imprisonment and fine of Rs. 1 lac including the default sentence and appellants are going sentence for approximately 12 years (11 years and 8 months) and they are not previous convicts and have been acquitted for offence under 8/23 NDPS Act. So

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(See separate judgment)

[CHATRA RAM JAT],J.

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